Supreme Court, U.S.
FILED

No. _____

10-368 SEP 15 2010

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In The
Supreme Court of the United States

STEVE BALDWIN and
PACIFIC JUSTICE INSTITUTE,

Petitioners,

KATHLEEN SEBELIUS, in her Official Capacity as Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, in her Official Capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; TIMOTHY F. GEITHNER, in his Official Capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. Whether the district court erred when it held, directly contrary to the U.S. District Court for the Eastern District of Virginia's decision in *Virginia v. Sebelius*, ___ F.Supp.2d ___, 2010 WL 2991385 (E.D.Va.), that petitioners' narrowly-tailored facial challenge to the individual mandate provision (Section 1501) of the recently passed Health Care Legislation, the *Patient Protection and Affordable Care Act*, P.L. 111-148, 124 Stat. 119 (2010), as amended by the *Health Care and Education Reconciliation Act of 2010*, P.L. 111-152, 124 Stat. 1029 (2010), is not justiciable under Article III because that provision does not become effective until 2014.

2. Whether the individual mandate provision in Section 1501 of the Act exceeds Congress' power under Article I, section 8 of the Constitution by regulating and taxing a citizen's decision not to participate in interstate commerce (*i.e.*, decision not to purchase health care insurance).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Pacific Justice Institute states that it is a California non-profit corporation and enjoys IRC § 501(c)(3) status, with no parent or publicly held company controlling any interest in Petitioner.

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Mr. Steve Baldwin and the Pacific Justice Institute petition for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The slip opinion of the district court is reported at 2010 WL 3418436 (S.D.Cal.) and is reprinted in the Appendix ("App.") 1-11.

JURISDICTION

The judgment of the district court was entered on August 27, 2010. The notice of appeal was timely filed on August 30, 2010. The case was docketed in the court of appeals on September 1, 2010, as No. 10-56374. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of Article I, section 8, clause 3 and Article III, section 2, clause 1 of the United States Constitution are found in App. 12. The relevant sections of the Health Care Legislation (P.L. 111-148

and P.L. 111-152) at issue in this case are set forth in App. 12-16.

STATEMENT OF THE CASE

The crux of this case was best stated in advance by the non-partisan Congressional Budget Office ("CBO") when it analyzed President Clinton's proposed health care legislation:

> "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government."

See, Congressional Budget Office website, *The Budgetary Treatment Of An Individual Mandate To Buy Health Insurance* 1 (1994), http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf (accessed: September 11, 2010).

More recently, in analyzing the individual mandate provision of the health care legislation at issue in this case, the Congressional Research Service

expressed the same reservations as those in the 1994 CBO Report:

> "Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service."

See, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009), http://assets.opencrs.com/rpts/R40725_20090724.pdf (accessed: September 11, 2010).

Furthermore, the Court should keep in mind that the overriding principle of limited government is the cornerstone of the Constitution, which was articulated early on by Chief Justice John Marshall in two landmark cases: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("*Marbury*"). Sixteen years later, Chief Justice

Marshall further clarified the principle announced in *Marbury*:

> "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("*McCulloch*").

It is upon this stage that the constitutional drama over government imposed health care will unfold.

On Christmas Eve of 2009, the Senate passed its health care bill, which originated under bill number H.R. 3590 and which the Senate titled: the *Patient Protection and Affordable Care Act*. *See*, Library of Congress, Bills and Resolutions, *H.R. 3590*, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@@S (accessed: September 11, 2010).

On March 21, 2010, the House passed the Senate health care bill (H.R. 3590). *See*, Library of Congress, Government Printing Office ("GPO"), *H.R. 3590*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ148.pdf (accessed: September 11, 2010).

On March 23, 2010, the President signed the Senate health care bill (H.R. 3590) into law as P.L. 111-148, 124 Stat. 119. *Id.*

On March 25, 2010, the House passed H.R. 4872, the Health Care and Education Reconciliation Act of 2010 ("Reconciliation Bill"), which amended the Senate Health Care Bill (P.L. 111-148). *See*, Library of Congress, Government Printing Office, *H.R. 4872*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ152.pdf (accessed: September 11, 2010). The Reconciliation Bill (H.R. 4872) is divided into two main parts, one addressing health care reform and the other addressing student loan reform.

On March 30, 2010, the President signed the Health Care and Education Reconciliation Act of 2010 (H.R. 4872) into law as P.L. 111-152, 124 Stat. 1029. *Id.* Hereinafter P.L. 111-148, *Patient Protection and Affordable Care Act* (Mar. 23, 2010; 124 Stat. 119), as amended by P.L. 111-152, *Health Care and Education Reconciliation Act of 2010* (Mar. 30, 2010; 124 Stat. 1029) will be referred to collectively as the "Act."

Petitioner Baldwin served in the California Assembly for the years 1994 through 2000. During his tenure in the California Legislature, he served as Minority Whip and as Chairman of the Education Committee and served on the Insurance Committee, the Health Committee, the Higher Education Committee, the High Technology Committee, and the Revenue and Taxation Committee. (App. 1-2, 18, ¶ 2.)

As far as specific legislative areas, Mr. Baldwin sponsored legislation creating medical savings accounts; business legislation to reduce taxes or reduce regulation; and education reform bills relating to phonics, the creation of state-wide academic standards, charter schools, and vouchers. (App. 19, ¶ 3.)

After he completed his tenure in the California Legislature in 2000, Mr. Baldwin took the position of Executive Director of the Council for National Policy ("CFNP"). CFNP is a nonpartisan, educational foundation, whose members are dedicated to the Founding Fathers' belief in limited government. *See*, Council for National Policy website, *About Us*, http://www.cfnp.org/Page.aspx?pid=180 (accessed: May 5, 2010). (App. 19, ¶ 4.)

Mr. Baldwin does not consent and objects to being compelled by the Act to maintain health care insurance. (App. 19, ¶¶ 8 & 9.)

Petitioner Pacific Justice Institute is a public interest and an education and legal defense organization. The areas in which Pacific Justice provides education and legal representation include but are not limited to: religious liberties; freedom of speech, association, and assembly; protection and sanctity of human life; parental rights; students' rights in public schools and colleges; religious charities; employees' rights in the workplace; union members' rights regarding contribution to charities. (App. 2, 22, ¶ 2.)

Pacific Justice is an employer and provides health care insurance to its employees and relies upon tax-deductible, charitable contributions for its operating budget. As an employer, Pacific Justice does not consent and objects to being compelled to comply with the Act because the Act imposes increased costs on it by preventing it from denying health care insurance coverage to part-time employees. (App. 23, ¶¶ 7, 12, & 13.)

Respondents are the United States Department of Health and Human Services ("HHS") and Kathleen Sebelius as Secretary of the HHS, the Department of Labor ("DOL") and Hilda Solis as Secretary of the DOL, and the Department of the Treasury ("DOT") and Timothy Geithner as Secretary of the DOT. Respondents are charged with enforcement of the Act. (App. 2.)

By way of their complaint in the district court, Petitioners sought, *inter alia*, declaratory and/or injunctive relief regarding the individual mandate provision set forth in Section 1501 of the Act. Section 1501(b) of the Act adds section 5000A(a) to the Internal Revenue Code, Title 26 U.S.C. ("IRC"), which provides:

> "Sec. 5000A(a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is

> covered under minimum essential coverage for such month."

Section 1501(b) of the Act mandates that individuals such as Petitioner Baldwin must maintain qualifying health care insurance coverage; otherwise, the IRS will impose an ever increasing monetary penalty. *See, e.g.*, sections 1501(b) and 10106 of the Act. The Act refers to the monetary penalty in two different ways, "*SHARED RESPONSIBILITY PAYMENTS*" and "*PENALTY*":

> "SEC. 5000A. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.
>
> (b) ***SHARED RESPONSIBILITY PAYMENT***. –
>
> (1) IN GENERAL. – If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c). . . .
>
> (3) PAYMENT OF ***PENALTY***. – If an individual with respect to whom a penalty is imposed by this section for any month . . .
>
> (c) AMOUNT OF ***PENALTY***. –
>
> (1) IN GENERAL. – The amount of the penalty imposed by this section on any

> taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of . . . "

Section 1501(b) of the Act (as amended by section 10106(b)(1)) (emphasis added).[1]

Thus, the Act compels individuals to perform an affirmative act or incur a penalty solely because they exist and reside in the United States. The Act is directed to inactivity (i.e., citizens who do not purchase health care insurance) that is driven by the constitutionally protected liberty of choice of all Americans. Furthermore, such inactivity by its very nature may not be deemed to be "*in commerce*" or to have any "*substantial effect on commerce*," whether interstate or otherwise, to properly and constitutionally trigger Congress' Commerce Power under Article I, § 8, cl. 3 of the Constitution.[2]

Petitioners filed a motion for preliminary injunction requesting the district court to enjoin enforcement of the Act. The Respondents countered by filing a motion to dismiss under F.R.Civ.P. 12(b)(1) for lack of justiciable claim under Article III.

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[1] The specific calculations for each of the full amount of penalties imposed by Section 5000A(b) & (c) are set forth in detail at App. 13-14.

[2] U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have the power . . . 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Prior to decision by the district court below, on August 2, 2010, the United States District Court for the Eastern District of Virginia **denied** the government's motion to dismiss for lack of justiciability under Article III, section 2, in a case that also challenged the individual mandate (Section 1501) of the Act. *Commonwealth of Virginia v. Sebelius*, ___ F.Supp.2d ___, 2010 WL 2991385 (E.D.Va.) ("*Virginia*").

On August 27, 2010, the district court denied the Petitioners' motion for preliminary injunction and granted the Respondents' motion to dismiss. (App. 1-11.)

REASONS FOR GRANTING THE PETITION

A petition for writ of certiorari before judgment in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

A. This Case Is Of Imperative National Importance

Roscoe Filburn could not have imagined that when he decided to plant extra wheat on his small farm to feed his livestock and for personal consumption that an ever increasing expansion of federal

power would be initiated. *See*, *Wickard v. Filburn*, 317 U.S. 111 (1942) ("*Wickard*"). Since this Court's decision in *Wickard*, Congress has slowly but inevitably encroached upon every aspect of life in America, culminating in the 2,559 page piece of legislation in this case that constitutes a federal takeover of the health care and health insurance industries.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("*Youngstown*"), this Court nullified the Executive Branch's war-time attempt to temporarily seize and operate most of the privately owned steel mills in the country. More dramatically, this Petition calls upon the Court to review an act of Congress that permanently nationalizes the health care and health care insurance industries, as well as compels individual citizens to engage in interstate commerce (i.e., to purchase health care insurance).

Furthermore, the individual mandate provision in Section 1501 of the Act exceeds Congress' power under Article I, section 8, clause 3 ("Commerce Clause"). As recently as last term, this Court confirmed that Congress is not vested with general police powers: "Nor need we fear that our holding today confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States.'" *United States v. Comstock*, 560 U.S. ___, 130 S. Ct. 1949, 1964 (2010) ("*Comstock*").

The individual mandate provision in Section 1501 of the Act conflicts with clear decisions of this

Court regarding the scope and extent of Congressional power. Specifically, in recent decisions of this Court, district and circuit courts have been instructed that there are limits to Congress' power under the Commerce Clause to federalize regulation of personal conduct. Starting in *United States v. Lopez,* 514 U.S. 549, 558-59 (1995) ("*Lopez*"), this Court held that Congress has no power to make a federal crime of possessing a hand gun within 1,000 feet of a school, even if the gun had traveled through interstate commerce. Next, in *United States v. Morrison,* 529 U.S. 598, 610-12 (2000) ("*Morrison*"), this Court held that Congress has no power to fashion a federal remedy for claims of violence against women. Finally, in a **unanimous** decision, this Court held that Congress has no power to make a federal crime of arson, even if the affected building is subject to a mortgage held by a bank **in another state**. *Jones v. United States,* 529 U.S. 848 (2000) ("*Jones*").

It is important to note that in the foregoing cases, this Court imposed stringent limits on Congress' power under the Commerce Clause relative to personal **conduct**. In this case, by way of the Act, Congress is attempting to impose federal regulation of an individual's **inaction**. Suffice it to say that nowhere in the Constitution is Congress vested with power to mandate that an individual (such as Baldwin) or entity (such as Pacific Justice) enter into a contract to purchase a good or service in general, or to purchase health care insurance in particular. Furthermore, no decision of this Court or other constitutional provision

or legal doctrine has ever authorized or upheld such a claim of congressional power, not even obliquely. Consequently, Congress' exercise of power under the Act is not only unprecedented and unauthorized by the Constitution, but also necessarily foreclosed by *Lopez*, *Morrison*, and *Jones*, *supra*.

Ironically, even members of the New Deal Era Court would blush at such an unrestrained and unauthorized exercise of Congressional power. For example, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) this Court acknowledged that there are limits to Congress' power under the Commerce Clause:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Id. at 30.

It is clear from the plain language of the Act in this case that even Congress realized that it was regulating **inactivity**, which was expressed in its findings:

> "FINDINGS. – Congress makes the following findings: . . . (2) EFFECTS ON THE NATIONAL ECONOMY AND INTERSTATE

> COMMERCE. – The effects described in this paragraph are the following: (A) In the absence of the requirement [i.e., the individual mandate to purchase health insurance], **some individuals would make an economic decision and financial decision to forego health insurance coverage . . . "**

See, Section 1501(a)(2)(A) (as amended by section 10106(a)) (emphasis added). This constitutes an admission by Congress that it is attempting to regulate **inactivity**. Never in the history of the nation has the Commerce Power been employed in such a manner as to require a person who is otherwise inactive to engage in economic activity. However, this is the trick being employed: before Congress can regulate an activity, such activity must already exist; thus, in the Act, Congress commands all citizens to engage in economic activity (i.e., purchase health insurance), then Congress regulates that activity. The obvious danger in ratifying such an exercise of Congressional power is that it would forever alter the relationship between the federal government and the people, making the former the master of the latter. If such an exercise of power were deemed constitutional, it would enable Congress to manage anything or everything by simply thrusting whatever (or whomever) it chooses into the stream of commerce on its own authority.

Placing *Lopez*, *Morrison*, and *Jones* aside for a moment, the Act still does not survive even when considering New Deal Era cases and a 2005 decision

of this Court, which stretch the limits of the Commerce Clause. For example, in *Wickard*, this Court approved Congress' regulation of a home farmer's wheat crop that was intended for personal consumption and was not intended to be sold. This Court concluded that notwithstanding the **intra**state nature of his wheat crop, Congress' power under the Commerce Clause could still reach this **activity**:

> "'The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those **activities** intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . .'"

Wickard, *supra*, 317 U.S. at 124 (emphasis added; quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("*Wrightwood Dairy*")). In quoting *Wrightwood Dairy*, the *Wickard* Court was again acknowledging what has always been and presently is the case: the Commerce Clause reaches only interstate and intrastate activity **not inactivity**.

More recently, in *Gonzales v. Raich*, 545 U.S. 1 (2005) ("*Raich*"), this Court rejected a Commerce Clause challenge to the Controlled Substance Act

("CSA").[3] The CSA regulated cultivating and possessing home-grown marijuana, even when done so intrastate and with the sanction of California's medicinal marijuana law.[4] In *Raich*, this Court analogized the cultivating and possession of marijuana with the home farmer in *Wickard*:

> "Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed 'to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . . ' and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets."

Id. at 18-19. Furthermore, in footnote 28, the Court sets out additional **activities** associated with illegal drug use and trade, which is instructive:

> "Even respondents acknowledge the existence of an illicit market in marijuana; indeed, Raich has personally participated in that market, and Monson expresses a willingness to do so in the future. App. 59, 74, 87. *See* also *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 770, 774,

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[3] 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*

[4] Cal. Health & Safety Code Ann. § 11362.5.

> n. 12, and 780, n. 17 (1994) (discussing the 'market value' of marijuana); *id.*, at 790 (REHNQUIST, C. J., dissenting); *id.*, at 792 (O'CONNOR, J., dissenting); *Whalen v. Roe*, 429 U.S. 589, 591 (1977) (addressing prescription drugs 'for which there is both a lawful and an unlawful market'); *Turner v. United States*, 396 U.S. 398, 417, n. 33 (1970) (referring to the purchase of drugs on the 'retail market')."

Id. at 18, n. 28.

What is important about *Raich* is that it clearly articulated the concept of economic **activities**, which it defined to include: "the production, distribution, and consumption of commodities." *Id.* at 25. Notice that the Court's use of these verbs necessarily requires **activity** on the part of the person being regulated. Here, the Act does not regulate anything but **inaction** on the part of citizens. Once the judiciary accepts this proposition there is no act that Congress could not compel citizens to do. It turns the Constitution's limits on federal power into grants of unlimited power over citizens. In short, it switches the relative positions of the people with the government: government's source of authority is no longer "*derived from the consent of the governed*"[5] but from its own interpretation and application of the Constitution.

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[5] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Furthermore, what predominates in *Wickard* and *Raich* (as well as **all** other Commerce Clause cases) is that there is some level of economic **activity** occurring, regardless of whether it occurs interstate or intrastate. No such activity is required under the Act – the only *sine qua non* to trigger Congress' regulation is the **inactivity** of citizens. A novel concept, but not authorized by any decision of this Court or the Commerce Clause.

What is also unprecedented and a serious concern to liberty is the technique Congress has employed in the Act in order to invoke its Commerce Clause jurisdiction. Specifically, in the first instance Congress regulates citizens' **inactivity** by commanding them to engage in activity (i.e., to purchase health care insurance) so that it can subsequently regulate that Congressionally created activity. Essentially, it is Congress (not individuals) who is creating activity and then regulating that very same activity. This is Congress placing the cart before the horse, so to speak. What is required in order for there to be a **valid** exercise of the Commerce Clause is **existing** economic **activity**, which is then subjected to regulation by Congress; not congressional creation of activity from inactivity as is the case with the Act.

Obviously, it is evident from section 1501(b) of the Act that Congress believes that under the Commerce Clause it has unlimited powers, including police powers that are vested in the States. Of course, such exercise of power by Congress is not authorized under the Commerce Clause. In rejecting

the government's position that Congress' reach under the Commerce Clause is essentially boundless, this Court in *Lopez* was quick to conclude that the Commerce Clause does not vest Congress with police powers:

> "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a ***general police power*** of the sort retained by the States."

Lopez, *supra*, 514 U.S. at 567 (emphasis added). If such a police power were self-vested in Congress, then the threat to individual liberty would be grave: if one cannot make one's own health and medical decisions, one's own economic decisions, then liberty has ceased to exist.

Although the foregoing discussion is brief, there can be no serious debate over the imperative public importance of the legal issues presented by this case.

B. The District Court's Decision Conflicts With A Decision Of A District Court In The Fourth Circuit

On August 2, 2010, the United States District Court for the Eastern District of Virginia issued its memorandum opinion in *Virginia*. While *Virginia* was not binding on the district court below, it is instructive and provides support for Petitioners' position. In particular, as in the case at Bar, at issue in *Virginia* is

the constitutionality of the individual mandate set forth in Section 1501(b) of the Act, including Petitioners' arguments in the case at Bar that Congress exceeded its authority under the Commerce Clause and the Respondents' argument that the case is not justiciable under Article III, sec. 2.[6] *Virginia, supra,* at 4.

In **denying** the federal defendant's motion to dismiss in *Virginia*, the Honorable Henry E. Hudson found that:

> "*The issues presented are purely legal and further development of the factual record would not clarify the issues for judicial resolution. . . . Neither the White House nor Congress has given any indication that the Minimum Essential Coverage Provision* [i.e., the individual mandate] *at issue will not be enforced, and the Court sees no reason to assume otherwise. The issues in this case are fully framed, the underlying facts are well settled, and the case is accordingly ripe for review. The Commonwealth has therefore satisfied all requirements of Article III standing*"

Id. at 7-8.

Consistent with the Petitioners' position throughout the proceedings in the case at Bar, Judge Hudson

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[6] U.S. CONST. art. III, § 2, cl. 1.

articulated that Congress has sailed into new constitutional waters regarding the individual mandate:

> *"No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so."*

Id. at 12. Interestingly, during oral argument in *Virginia*, Secretary Sebelius admitted as much and more:

> *"The Secretary appeared to concede during oral argument, however, that if the ability to require the Minimum Essential Coverage Provision is not within the letter and spirit of the Constitution, [then] the penalty necessarily fails . . . "*

Id. at 16. As admitted by the Assistant Attorney General during oral argument, *"if it* [i.e., the individual mandate] *is unconstitutional, then the penalty would fail as well." Id.*

Moreover, in *Virginia* (as in the case at Bar), the federal defendant made the objection that the individual mandate does not become effective until 2014. However, Judge Hudson dispatched this argument, driving home the principle that Congress cannot insulate itself merely by postponing the starting date while spending the next four years revving up the engine:

> *"While the mandatory compliance provisions of the Minimum Essential Coverage Provision do not go into effect until 2014, that does*

> *not mean that its effects will not be felt by the Commonwealth in the near future. This provision will compel scores of people who are not currently enrolled to evaluate and contract for insurance coverage. Individuals currently insured will be required to be sure that their present plans comply with this regulatory regimen. Insurance carriers will have to take steps in the near future to accommodate the influx of new enrollees to public and private insurance plans. Employers will need to determine if their current insurance satisfies the statutory requirements."*

Id. at 16.

Even after having the benefit of *Virginia* (a copy of the opinion was filed as supplemental authority), the district court below held to the contrary, concluding that Petitioners' claims were not justiciable under Article III, section 2 because the individual mandate does not become effective until 2014. Accordingly, the district court denied the Petitioners' motion for preliminary injunction and granted the Respondents' motion to dismiss. (App. 11.)

Typically when a party petitions for certiorari it is best to demonstrate that a conflict exists at the **circuit** (rather than district) court level. However, due to the magnitude of the impact of the Act on the economy and the health care and health insurance industries, as well as the fact that a significant portion of the Act is in effect and is already being implemented in all other respects, this Court should

intervene now to determine the constitutionality of the individual mandate provision. As the conflict now exists within the Fourth and Ninth Circuits, the holding and effect of these two rulings further supports this Court's intervention to ensure a uniform resolution and application of the Act.

Regarding the Article III injury sustained by the existence of the individual mandate, the district court held:

> "As to Plaintiff Baldwin, he does not indicate whether he has health insurance or not. But that is of no moment because, even if he does not have insurance at this time, he may well satisfy the minium [sic] coverage provision of the Act by 2014: he may take a job that offers health insurance, or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act."

(App. 7.) This completely misses the mark, as *Virginia* clearly recognized the extensive complexity that is created by the demands of the individual mandate. For example, in *Virginia* the court noted that action is required of all people regardless of the oversimplified question of whether they have or do not have health care insurance.

As set forth above, *Virginia* contradicts the district court below, because it found that the individual mandate provision has already caused: millions of citizens to alter or commence altering their positions regarding health insurance coverage; the

entire health care and health care insurance industries to commence restructuring; and employers (such as petitioner Pacific Justice) to analyze compliance requirements and start restructuring. *Virginia, supra,* at 16.

Another point made in the district court by Petitioners is that enforcement of the individual mandate is inevitable, as it is required by section 1501(b) of the Act. Moreover, there is nothing abstract about this section of the Act; nor will this Court's exercise of jurisdiction violate the principle underlying the Ripeness Doctrine, which is designed:

> " . . . to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements."

Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967) ("*Abbott*"). Consistent with the principles announced in *Abbott*, the individual mandate is neither an abstraction nor a disagreement, but rather is an actual and clear inevitability. Further, this case is not a situation where Petitioners' claims are vague and "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) ("*Union Carbide*").

Since the issues raised in this Petition are purely legal, there is no further factual development required in order for this Court to make a determination on the constitutionality of the individual mandate (a point made in *Virginia*, pp. 7-8). Stated

another way, the dictates of the individual mandate are clearly set forth in section 1501(b) and are self-executing, to wit: individuals must maintain a Congressionally mandated amount of health care insurance. Furthermore, this Court has developed a prudential component of the Ripeness Doctrine, which supports that a pre-enforcement determination of the individual mandate may be made by this Court **at this time**. *See, e.g., Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) ("*Duke Power*"). In *Duke Power*, this Court found the Ripeness Doctrine was not a bar to a pre-enforcement challenge, even where no nuclear accident had yet occurred (i.e., it was an uncertain, future event – the same argument rejected in *Duke Power* is now being made by Respondents in the case at Bar):

> "The prudential considerations embodied in the ripeness doctrine also argue strongly in favor for a prompt resolution of the claims presented. Although it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, **it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution** . . . Since we are persuaded that '**we will be in no better a position later than we are now' to decide [the**

> **constitutional] question, we hold that it is presently ripe for adjudication.**"

Id. at 81-82 (emphasis added).

As in the district court, Respondents will not provide any explanation as to how this Court would be in any better a position in 2014 than it is presently to decide the serious and substantial constitutional questions relating to the individual mandate. Moreover, here, as in *Duke Power*, prudence dictates that before the health care and health insurance industries are transformed from private entities to agents of the federal government and trillions of dollars are spent, the constitutionality of the Act's cornerstone, the individual mandate, should be decided now rather than in four years. *Id.*

Finally, Petitioners respectfully suggest that a fair and constitutional application of the foregoing cases under Article III would support this Court's finding of justiciability in this case because the:

1. claims are purely legal (here the claims rest on pre-enforcement, facial challenge to the Act);

2. challenged provision of the Act presents a clear constitutional violation (in this case the individual mandate provision exceeds Congress' power under Article I, sec. 8, cl. 3, i.e., the Commerce Clause);

3. enforcement of an indispensible section of the challenged act of Congress is not only inevitable but indispensible to implement the purpose of the

legislation (*e.g.*, the individual mandate is the cornerstone and Congressional justification for the entire Act);

4. delay in resolving the constitutional questions does not place this Court in a better position than if they were immediately addressed (here, as in *Duke Power*, delaying review of the constitutionality of the individual mandate serves no prudential consideration under the Ripeness Doctrine); and

5. issues raised are of imperative national importance and prompt resolution of the constitutionality of the individual mandate provision would serve the public interest (*e.g.*, in this case the Act takes control of one-sixth of the U.S. economy by nationalizing the health care and health insurance industries and the spending of trillions of dollars).

The foregoing demonstrates that this Court's intervention at this point is appropriate in order to resolve the conflict within the circuits, especially in light of the imperative importance of the issues raised in this case.

C. The Act Does Not Include A Severability Clause, And, Therefore, Any Doubt As To The Constitutionality Of The Individual Mandate Provision Should Be Immediately Resolved By This Court

Although the challenge presented by this Petition is narrowly tailored, the impact of the individual

mandate provision being held to be unconstitutional would be so broad that it requires this Court's immediate attention and analysis. This is because the Act does not have a severability clause to save the remaining provisions in the event the Court holds that the individual mandate provision is unconstitutional.

Absent a severability clause, which would enable the Court to strike down one provision without impacting the effectiveness of the rest of the Act, the need for a constitutional determination by this Court of the individual mandate provision is not only authorized but necessary. The interplay between provisions and the overall effectiveness of any act of Congress must be determined. For example:

> "Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."

Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987). Furthermore, it must be determined "whether [after removing the invalid provision] the [remaining] statute will function in a manner consistent with the intent of Congress." *Id.* at 685 (original emphasis omitted).

Two indicators point to the intent of Congress for the Act to be without a severability clause. First, Congress specifically removed a severability clause where it had previously existed in an earlier version of the Act. Second, the Act cannot function properly

independent of the individual mandate. For example, in its findings in support of the Act, Congress argued that provisions that prohibit the denial of coverage based on preexisting conditions are balanced by the individual mandate, which will "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." Section 1501(a)(2)(I) of the Act (as amended by section 10106(a)).

This expression of Congressional intent demonstrates that the individual mandate provision is meant to work in concert with the rest of the Act and supports the fact that it neither has nor was intended to have a severability clause. Accordingly, the destiny of the Act itself is inextricably intertwined with the constitutionality of the individual mandate provision.

In light of the staggering amount of investments of time and money being made, the restructuring of the health care and health care insurance industries, and the impact on private employers as a result of passage of the Act, this Court's determination of the constitutionality of the individual mandate provision is necessary at this time.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari before judgment in the court of appeals should be GRANTED.

Respectfully submitted,

PETER D. LEPISCOPO
Counsel of Record

Counsel for Petitioners
Steve Baldwin and
Pacific Justice Institute

September 15, 2010.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEVE BALDWIN and PACIFIC JUSTICE INSTITUTE, Plaintiffs, vs. KATHLEEN SEBELIUS, et al., Defendants.	CASE NO. 10CV1033 DMS (WMC) **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** [Docs. 6 & 22]

Pending before the Court are Defendants' motion to dismiss and Plaintiffs' motion for preliminary injunction. For the reasons set forth below, Defendants' motion to dismiss is granted and Plaintiffs' motion for preliminary injunction is denied.

I.

BACKGROUND

Plaintiffs Steve Baldwin and the Pacific Justice Institute have filed suit seeking declaratory and injunctive relief based upon their challenge to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub.L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010) (collectively the "Act"). Plaintiff Baldwin is a former member of the California Assembly and is a

"devout and practicing Christian." (Compl. ¶¶ 15, 17.) Plaintiff Pacific Justice Institute is an education and legal defense organization which primarily represents Christians and Christian organizations. (*Id.* at ¶¶ 29-30.) Pacific Justice Institute is an employer and it provides health insurance to its employees. (*Id.* at ¶ 27.) Defendants are the United States Department of Health and Human Services ("HHS") and Kathleen Sebelius as Secretary of the HHS, the Department of Labor ("DOL") and Hilda Solis as Secretary of the DOL, and the Department of the Treasury ("DOT") and Timothy Geithner as Secretary of the DOT.

The Act was signed into law in March 2010, following lengthy public debate and discussion regarding the issue of health care reform. One of the key provisions challenged by Plaintiffs is a requirement that, beginning in 2014, individuals, with certain exceptions, must maintain a minimum level of health insurance coverage or pay a penalty. Pub. L. No. 111-148 §§ 1501, 10106, *amended by* Pub. L. No. 111-152 § 1002. The Act also requires employers of a certain size to provide health insurance for their employees or pay a penalty. *See* Pub. L. No. 111-148 § 1513. Plaintiffs object to being compelled to comply with these provisions of the Act. (Compl. ¶¶ 20, 47-49.)

Plaintiffs allege the Act is unconstitutional because Congress lacks authority under the Commerce Clause to require individuals and employers to purchase health insurance. Plaintiffs also allege Congress acted outside the scope of its enumerated

powers in passing the Act, the penalty imposed for failure to purchase health insurance is a direct tax that was not apportioned among the states according to census data, and the revenue raising provisions of the Act did not originate in the House of Representatives. Baldwin further alleges the individual mandate of the Act violates his right to privacy and his physician-patient privilege.

In addition to the individual mandate and employer responsibility provisions, Plaintiffs challenge several other aspects of the Act. For example, Plaintiffs allege Secretary Sebelius failed to comply with Section 1552 of the Act, which required her, within 30 days after enactment of the Act, to "publish on the Internet website of the Department of Health and Human Services, a list of all of the authorities provided to the Secretary under this Act (and the amendments made by this Act)." Pub. L. No. 111-148 § 1552. Plaintiff Baldwin also raises a claim for violation of the Equal Protection clause. Specifically, Baldwin alleges he has health issues related to his prostate and desires increased research in men's health, including in the areas of prostate health and prostate cancer. (Compl. ¶ 16.) Baldwin contends the Act is discriminatory because it creates several Offices of Women's Health, with unlimited monetary appropriations, without corresponding Offices of Men's Health. (Comp. ¶¶ 161-168.)

Finally, Plaintiffs are concerned that public funds will be used for abortion. Following enactment of the Act, the President of the United States signed an

executive order "to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services." Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). The Executive Order "maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges." *Id.* Nevertheless, Plaintiffs fear public funds will be used for abortions, (Compl. ¶¶ 18, 36), and seek a declaration prohibiting such use of public funds.

Plaintiffs filed suit on May 14, 2010, and soon thereafter sought to enjoin enforcement of the Act. (Docs. 1, 3 & 6.) On June 10, 2010, this Court denied Plaintiffs' motion for temporary restraining order on grounds that Plaintiffs had not shown such relief was necessary prior to the hearing on preliminary injunction. (June 10, 2010 Order at 2.) On June 25, 2010, Defendants filed their motion to dismiss. (Doc. 25.) The parties agreed to combine the motions, and to submit the motions without oral argument. (Docs. 20 & 32.) On August 2, 2010, the United States District Court for the Eastern District of Virginia ruled on a motion to dismiss in *Commonwealth of Virginia v. Sebelius, et. al.*, No. 3:10-cv-188-HEH, a case which also challenges the Act. The parties submitted supplemental briefing on the issues raised in that case. (Docs. 34-36.)

II.

DISCUSSION

Defendants move to dismiss Plaintiffs' complaint under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Defendants contend Plaintiffs lack standing to sue because they have not adequately alleged an injury-in-fact, Plaintiffs' claims are not ripe, and the claims are barred by the Anti-Injunction Act. Defendants also move to dismiss under Rule 12(b)(6) for failure to state a claim. Defendants correctly argue Plaintiffs lack standing, and as that issue is dispositive, the balance of Defendants' argument are not addressed.

To establish the "irreducible constitutional minium [sic] of standing" under Article III, § 2 of the United States Constitution, Plaintiffs must demonstrate: (1) an "'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) the injury is fairly traceable to the action of the defendant, and (3) it is likely the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* at 561 n. 1. Standing "requires federal courts to satisfy themselves that 'the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction.'" *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149,

___ U.S. ___ (2009) (quoting *Warth v. Seldin,* 422 U.S. 490, 498-499 (1975) (original emphasis).

A plaintiff satisfies the injury in fact requirement if he or she suffers "some threatened or actual injury resulting from the putatively illegal action." *Scott v. Pasadena Unified Sch. Dist.,* 306 F.3d 646, 656 (9th Cir. Cal. 2002) (quotations omitted). Allegations of future injury will satisfy the requirement "only if [the plaintiff] 'is *immediately* in danger of sustaining some *direct* injury as the result of the challenged official conduct.'" *Id.* (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (original emphasis). Further, "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan,* 504 U.S. at 573-74; *see also Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 474 (1982) (discussing prudential standing considerations and noting that "the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."). Plaintiffs bear the burden of establishing standing, *Summers,* 129 S. Ct. at 1149, and as discussed below, fail to meet their burden.

In Claims One through Four of the Complaint, Plaintiffs allege Congress violated several constitutional provisions when instituting the individual mandate and employer responsibility provisions of the Act. Plaintiffs, however, do not allege any particularized injury stemming from the Act. The employer responsibility provision applies to employers with at least 50 full time equivalent employees. Pub. L. No. 111-148 § 1513(d)(2)(A). Pacific Justice makes no allegation that it has, or will have, 50 full time employees at the time the mandate takes effect. Further, even if the Act applied to Plaintiff, Pacific Justice already provides health insurance to its employees. Its current coverage may satisfy the requirements under the Act when it goes into effect; however it is impossible to know now whether or not Plaintiff will be subject to or compliant with the Act in 2014. As to Plaintiff Baldwin, he does not indicate whether he has health insurance or not. But that is of no moment because, even if he does not have insurance at this time, he may well satisfy the minium [sic] coverage provision of the Act by 2014: he may take a job that offers health insurance, or qualify for Medicaid or Medicare, or he may choose to purchase health insurance before the effective date of the Act.

Nevertheless, Plaintiffs argue they have standing because the provisions of the Act are certain to take effect in 2014 and the record before the Court would not benefit from further factual review. These arguments, however, ignore the requirement of an injury in fact. While Plaintiffs state they "do not consent to

being compelled to comply" with the Act, they cannot manufacture standing by withholding their consent to the law. While Plaintiffs object to the mandate to purchase health insurance, they have not shown they would be subject to any penalty as a result of the Act. To the extent Plaintiffs seek relief because "Congress['s] and the President's failure to pass constitutionally sound heath [sic] care legislation undermines the rule of law," Pls.' Mot. Prelim. Inj. at 3, Plaintiffs are simply airing generalized grievances that the Court is precluded from adjudicating. *Lujan,* 504 U.S. at 573-74. Accordingly, Claims One through Four are dismissed for lack of standing.

Next, in Claims Six and Seven, Baldwin alleges the individual mandate of the Act violates his right of privacy because it interferes with his "right to be free from unwanted and unwarranted governmental intrusion into matters so fundamentally affecting a person such as the decision whether and to what extent to subject one's own body to medical treatment or being compelled by the government to maintain health insurance." (Compl. ¶ 136.) Baldwin further alleges that several provisions of the Act require him to provide a broad range of personal and private information, which violates his privacy rights and physician-patient privilege. (*Id.* at ¶¶ 134, 147-149.)

Here again, Plaintiffs do not cite any provision of the Act which forces Baldwin to submit to unwanted medical treatment, nor is there any allegation that Baldwin's decisions regarding medical treatment have been affected by the Act. Simply put, Baldwin

fails to allege a particularized injury stemming from violation of his privacy rights. If he has health insurance, the provisions of the Act may well have no affect on him; if he does not have insurance, he alleges no facts that he would not purchase health insurance in 2014, but for the requirements of the Act.

Baldwin further objects to "being compelled by sections 1002, 1331, 1441, 3015, and 3504 of the Act to provide a broad range of personal and private marital, tax, financial, health, and/or medical related information; nor did he consent to this information being collected, aggregated, integrated, and disseminated by and between the federal government, state and local governments, and private entities." (Compl. ¶¶ 134, 147.) But Plaintiff does not, nor can he at this time, allege that he has been compelled by the Act to provide personal information, that his personal information has been used improperly, or that use of his personal information has in any way eroded his physician-patient privilege.[1] Plaintiffs' Sixth and Seventh claims are therefore dismissed for lack of standing.

Next, Plaintiffs allege in their Fifth claim for relief that Secretary Sebelius failed to comply with

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[1] Notably, there is no cause of action for violation of an evidentiary privilege. *See In re Madison Guar. S&L Ass'n*, 173 F.3d 866, 869 (D.C. Cir. 1999) ("We know of no authority, and indeed perceive no logic, that would support the proposition that the Rules of Evidence create any cause of action or ever provide standing.").

Section 1552 of the Act by failing to publish certain information on the HHS website. Yet, Plaintiffs do not allege an injury stemming from this alleged failure. This claim is therefore dismissed for lack of standing.

Next, Baldwin alleges in his Eighth claim for relief that the Act created five Offices of Women's Health. Baldwin contends that since the Act did not create corresponding Offices for Men's Health, the Act violates the Equal Protection Clause of the United States Constitution. Defendants point out that the Offices of Women's Health existed prior to the creation of the Act. Again, Plaintiff has failed to demonstrate that the Act has caused him injury.

Finally, in Claim Nine of their complaint, Plaintiffs seek a declaration that public funds may not be used for abortions. Plaintiffs argue that despite the Hyde Amendment and the Executive Order which "maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges," loopholes exist and community health centers may nevertheless use public funds for abortions. Plaintiffs object to public funds being used for abortion. Plaintiffs' objection, however, states only a generalized grievance. Because no particularized injury is alleged, nor is there any allegation that public funds actually have been used for abortions, Plaintiffs have failed to establish standing to assert this claim.

III.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is granted without prejudice and Plaintiffs' motion for preliminary injunction is denied. Because Plaintiffs' claims fail on standing grounds, the Court declines to reach other issues raised in the briefs. Plaintiffs may file an amended complaint on or before September 10, 2010.

IT IS SO ORDERED.

DATED: August 27, 2010

/s/ Dana M. Sabraw
HON. DANA M. SABRAW
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

COMMERCE CLAUSE

> The Congress shall have the power . . . 3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

U.S. CONST. art. I, § 8, cl. 3.

CASE OR CONTROVERSY – JUSTICIABLE CASES

> Section 2. 1. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; – to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States, – between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

STATUTORY PROVISIONS OF THE HEALTH CARE ACT (P.L. 111-148 AND 111-152)

CONGRESSIONAL FINDINGS:

FINDINGS. – Congress makes the following findings: . . . (2) EFFECTS ON THE NATIONAL ECONOMY AND INTERSTATE COMMERCE. – The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.

* * *

(I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is

essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.

Section 1501(a)(2)(A) & (I) of the Act (as amended by section 10106(a)).

INDIVIDUAL MANDATE:

Sec. 5000A(a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

Section 1501(b) of the Act.

MONETARY PENALTIES:

SEC. 5000A. REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

* * *

(b) ***SHARED RESPONSIBILITY PAYMENT***. –

(1) IN GENERAL. – If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the

requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c). . . .

* * *

(3) PAYMENT OF ***PENALTY***. – If an individual with respect to whom a penalty is imposed by this section for any month . . .

(c) AMOUNT OF ***PENALTY***. –

(1) IN GENERAL. – The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of –

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) MONTHLY PENALTY AMOUNTS. – For purposes of paragraph

(1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) FLAT DOLLAR AMOUNT. – An amount equal to the lesser of –

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) PERCENTAGE OF INCOME. – An amount equal to the following percentage of the taxpayer's household income for the taxable year:

(i) 0.5 percent for taxable years beginning in 2014.

(ii) 1.0 percent for taxable years beginning in 2015.

(iii) 2.0 percent for taxable years beginning after 2015.

Section 1501(b) of the Act (as amended by section 10106(b)(1)).

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEVE BALDWIN and **PACIFIC JUSTICE INSTITUTE**, Plaintiffs, v. **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services; **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES**; **HILDA L. SOLIS**, in her official capacity as Secretary of the United States	Case No. **10-CV-1033 DMS (WMc)** **DECLARATION OF STEVE BALDWIN IN SUPPORT OF STEVE BALDWIN AND PACIFIC JUSTICE INSTITUTE'S MOTION FOR PRELIMINARY INJUNCTION** [Health Care Legislation: P.L. 111-148 and P.L. 111-152] ***[MOTION TO FILE BRIEF EXCEEDING***

Department of Labor; **UNITED STATES DEPARTMENT OF LABOR**; **TIMOTHY F. GEITHNER**, in his official capacity as Secretary of the United States Department of the Treasury; **UNITED STATES DEPARTMENT OF THE TREASURY**; and DOES 1 through 20, inclusive, Defendants.	***LOCAL RULE 7.1(h) CONCURRENTLY FILED WITH THIS MEMORANDUM]*** DATE: **July 16, 2010** TIME: **1:30 P.M.** COURTROOM: **10** COURTROOM: **10** JUDGE: **HONORABLE DANA M. SABRAW** TRIAL DATE: **None Set**

DECLARATION OF STEVE BALDWIN

(Filed May 19, 2010)

I, Steve Baldwin, declare as follows:

1. I am a plaintiff in this action and I reside within the County of San Diego. I am over the age of eighteen and have personal knowledge of the herein stated matters, and, if called upon as a witness, could and would testify competently and accurately to the herein stated matters.

2. I served in the California Assembly for the years 1994 through 2000, at which time I was termed-out under California's Term Limits law. During my tenure in the California Legislature, I served as Minority Whip and as Chairman of the Education Committee and served on the Insurance Committee, the Health Committee, the Higher Education Committee,

the High Technology Committee, and the Revenue and Taxation Committee.

3. As far as specific legislative areas, I sponsored legislation creating medical savings accounts; business legislation to reduce taxes or reduce regulation; and education reform bills relating to phonics, the creation of state-wide academic standards, charter schools, and vouchers.

4. After I completed my tenure in the California Legislature in 2000, I took the position of Executive Director of the Council for National Policy ("CFNP"). CFNP is a nonpartisan, educational foundation, whose members are dedicated to the Founding Fathers' belief in limited government. *See*, Council for National Policy website, About Us, http://www.cfnp.org/Page.aspx?pid=180 (accessed: May 5, 2010).

* * *

8. I do not consent to being compelled by the Act to maintain health care insurance, as Congress has added police powers to the Enumerated Powers set forth in Article I, section 8 of the Constitution.

9. I object to the Act's provisions compelling me to maintain health care insurance because they violate my right to privacy protected under the Constitution and Bill of Rights.

* * *

I declare, under penalty of perjury under the laws of the State of California and the United States

of America, that the foregoing is true and correct and is of my own personal knowledge, and indicate such below by my signature executed on this 17th day of May, 2010, in the County of Sacramento, State of California.

/s/ Steve Baldwin
Steve Baldwin

[Certificate Of Service Omitted In Printing]

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Attorneys for Plaintiffs, **STEVE BALDWIN** and **PACIFIC JUSTICE INSTITUTE**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEVE BALDWIN and **PACIFIC JUSTICE INSTITUTE**, Plaintiffs, v. **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services; **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES**; **HILDA L. SOLIS**, in her official capacity as Secretary of	Case No. **10-CV-1033 DMS (WMc)** **DECLARATION OF BRAD DACUS IN SUPPORT OF STEVE BALDWIN AND PACIFIC JUSTICE INSTITUTE'S MOTION FOR PRELIMINARY INJUNCTION** [Health Care Legislation: P.L. 111-148 and P.L. 111-152] **[F.R.Civ.P. Rule 65]**

the United States Department of Labor; **UNITED STATES DEPARTMENT OF LABOR; TIMOTHY F. GEITHNER**, in his official capacity as Secretary of the United States Department of the Treasury; **UNITED STATES DEPARTMENT OF THE TREASURY**; and DOES 1 through 20, inclusive, Defendants.	***[MOTION TO FILE BRIEF EXCEEDING LOCAL RULE 7.1(h) CONCURRENTLY FILED WITH THIS MEMORANDUM]*** DATE: **July 16, 2010** TIME: **1:30 P.M.** COURTROOM: **10** COURTROOM: **10** JUDGE: **HONORABLE DANA M. SABRAW** TRIAL DATE: **None Set**

DECLARATION OF BRAD DACUS

(Filed May 19, 2010)

I, Brad Dacus, declare as follows:

1. I am the president of plaintiff Pacific Justice Institute ("Pacific Justice"). I am over the age of eighteen and have personal knowledge of the herein stated matters, and, if called upon as a witness, could and would testify competently and accurately to the herein stated matters.

2. Pacific Justice is a public interest and an education and legal defense organization. The areas in which Pacific Justice provides education and legal representation include but are not limited to: religious liberties; freedom of speech, association, and assembly; protection and sanctity of human life;

parental rights; students' rights in public schools and colleges; religious charities; employees' rights in the workplace; union members' rights regarding contribution to charities.

* * *

7. Pacific Justice is an employer and provides health care insurance to its employees and relies upon tax-deductible, charitable contributions for its operating budget.

* * *

12. As an employer, Pacific Justice does not consent to being compelled to comply with the Act, as the Act imposes increased costs on it by compelling employer health plans and employer health insurance providers to insure employees' dependent unmarried children for extended period of time (until age 26).

13. As an employer, Pacific Justice does not consent to being compelled to comply with the Act because the Act imposes increased costs on it by preventing it from denying health care insurance coverage to part-time employees.

I declare, under penalty of perjury under the laws of the State of California and the United States of America, that the foregoing is true and correct and is of my own personal knowledge, and indicate such below by my signature executed on this 17th day of

May, 2010, in the County of Sacramento, State of California.

/s/ Brad Dacus
Brad Dacus

[Certificate Of Service Omitted In Printing]

(2)

No. 10-369

Supreme Court, U.S.
FILED
OCT 0 3 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

STEVE BALDWIN and
PACIFIC JUSTICE INSTITUTE,

Petitioners,

v.

KATHLEEN SEBELIUS, in her Official Capacity as Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, in her Official Capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; TIMOTHY F. GEITHNER, in his Official Capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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THE COURT SHOULD GRANT THE PETITION DUE TO THE CONFLICTING DISTRICT COURT DECISIONS IN THE FOURTH, SIXTH, AND NINTH CIRCUITS

Pursuant to Rule 15.8, Petitioners respectfully submit this supplemental brief in support of their petition for writ of certiorari for the purpose of bringing to the Court's attention to the October 7, 2010, decision of the U.S. District Court for the Eastern District of Michigan in *Thomas More Law Center v. Obama*, ___ F.Supp.2d ___, 2010 WL ___, Court Doc. No. 28 (E.D. Mich.) ("*Thomas More*").[1] Contrary to the district court's decision in the case at Bar, in *Thomas More* the district court held that:

1. The plaintiffs have standing under Article III to challenge the Individual Mandate provision of the Act. *Id.* at 4-8.

2. The plaintiffs' challenge to the Individual Mandate provision of the Act was ripe for review, even though that provision does not become effective until 2014. *Id.* at 8-9.

---

[1] Petitioners' counsel has been in contact with Westlaw regarding the date of publication of the opinion in *Thomas More*. Counsel was informed that the opinion would not be published for 3-14 days. Thus, in order to provide the Solicitor General with the optimum amount of time to respond, Petitioners' citation to *Thomas More* will be to the official opinion appearing in electronic format as Document Number 28 in the U.S. District Court for the Eastern District of Michigan.

In *Thomas More*, as in the case at Bar, the plaintiffs' alleged basis for standing was that they "***object to being compelled by the federal government to purchase health care coverage***." *Id.* at 5 (emphasis added). In support of its finding of standing and ripeness under Article III, the district court in *Thomas More* reasoned:

> "The economic burden due to the Individual Mandate is felt by plaintiffs regardless of their specific financial behavior. The Act does not make insurance more costly, in fact the contrary is expected; rather the Act requires plaintiffs to purchase insurance when they otherwise would not have done so. This case is distinguishable from Sanner [v. Board of Trade, 62 F.3d 918, 923 (7th Cir. 1995)] because the government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014.
>
> Plaintiffs' decisions to forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014, are injuries fairly traceable to the Act for the purposes of conferring standing. There is nothing improbable about the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today. See Friends

> of Earth [v. Laidlaw Environmental Services, 528 U.S. 167, 184 (2000)]."

Id. at 7.

The district court in *Thomas More* provides a persuasive analogy explaining the relation of Article III to the Individual Mandate's planned 2014 effective date:

> "Parents wishing to send their child to college often start saving money for that purpose as soon as the child is born, even though the expense will not be incurred for eighteen years. And while such parents may be diligent in their saving, making many sacrifices along the way, their child might earn a scholarship to college, or decide to forego higher education, thus rendering the parents' sacrifices unnecessary. Such outcomes, however, do not diminish the real financial burden felt by the parents in earlier years."

Id. at 8.

In addressing the issue of ripeness, the district court in *Thomas More* identified the need for expediency in deciding the constitutionality of the Individual Mandate provision, which is an interest that is held not only by the plaintiffs in *Thomas More* but the government as well:

> "It certainly appears that the government has an interest in knowing sooner, rather than later, whether an essential part of its

> program regulating the national health care market is constitutional, although in this case it is not the government asking for the review."

Id. at 9.

In *Thomas More*, the district court recognized that there is no need for any further development of a factual record before the judiciary can review the constitutionality of the Individual Mandate provision:

> "This case presents a purely legal issue which 'would not be clarified by further factual development.' Therefore, this case is ripe for consideration by the court."

Id. (internal citation omitted). As they did in the district court, Petitioners argue this precise point in the petition (*see*, pp. 24-25).

Finally, the district court in *Thomas More* went on to uphold the Individual Mandate provision under Article I, section 8, clause 3, the Interstate Commerce Clause. *Thomas More*, *supra*, at 11-19.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari before judgment in the court of appeals should be GRANTED.

Respectfully submitted,

PETER D. LEPISCOPO
Counsel of Record

Counsel for Petitioners
Steve Baldwin and
Pacific Justice Institute

October 8, 2010

Supreme Court, U.S.
FILED
OCT 15 2010
OFFICE OF THE CLERK

No. 10-369

In The Supreme Court of the United States

STEVE BALDWIN and
PACIFIC JUSTICE INSTITUTE,

Petitioners,

v.

KATHLEEN SEBELIUS, in her Official Capacity as Secretary of the U.S. Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA L. SOLIS, in her Official Capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; TIMOTHY F. GEITHNER, in his Official Capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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DUE TO THE DECISION IN THE FLORIDA HEALTH CARE CASE, *STATE OF FLORIDA v. U.S. DEPT. OF H.H.S.*, THE COURT SHOULD GRANT THE PETITION BECAUSE NOW THERE ARE CONFLICTING DISTRICT COURT DECISIONS IN FOUR CIRCUITS: THE FOURTH, SIXTH, NINTH, AND ELEVENTH CIRCUITS

Pursuant to Rule 15.8, Petitioners respectfully submit this supplemental brief in support of their petition for writ of certiorari for the purpose of bringing to the Court's attention the October 14, 2010, decision of the U.S. District Court for the Northern District of Florida in *State of Florida, et al. v. U.S. Dept. of HHS*, ___ F.Supp.2d ___, 2010 WL 4010119 (N.D. Fla.) ("*Florida*"). Contrary to the district court's decision in the case at Bar, in *Florida* the district court held that:

1. The plaintiffs have standing under Article III to challenge the Individual Mandate provision of the Act. *Id.* at 17-21.

2. The plaintiffs' challenge to the Individual Mandate provision of the Act was ripe for review, even though that provision does not become effective until 2014. *Id.* at 21-23.

In finding that plaintiffs had standing to challenge the Individual Mandate provision even though it is not effective until 2014, the district court in *Florida* concluded:

> "[T]he injury alleged in this case will not occur at 'some indefinite future time.' **Instead, the date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty**. See ACLU of Florida, Inc. v. Miami-Dade County School Bd., 557 F.3d 1177, 1194 (11th Cir. 2009) (standing shown in pre-enforcement challenge where the claimed injury was 'pegged to a sufficiently fixed period of time'). Because time is the primary factor here, this case presents a durational issue, and not a contingency issue. 'A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But, one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (citations and brackets omitted)."

Id. at 18 (emphasis added).

In *Florida*, the government raised a temporal argument that since 2014 was forty months away it is so far off in time that plaintiffs do not have standing. The district court rejected this argument:

> "The defendants concede that an injury does not have to occur immediately to qualify as an injury-in-fact, but they argue that forty

> months 'is far longer than typically allowed.' Def. Mem. at 27. It is true that forty months is longer than the time period at issue in the particular cases the defendants cite . . . But, the fact that the harm was closer in those cases does not necessarily mean that forty months is ipso facto 'too far off.' . . . Imposition of the individual mandate and penalty, like the fee in Village of Bensenville, is definitively fixed in time and impending. **And absent action by this court, starting in 2014, the federal government will begin enforcing it**."

Id. (citations omitted; emphasis added).

As to the issue of ripeness, in *Florida* the government argued that since the Individual Mandate does not become effective until 2014, there can be no injury until that time. In rejecting this argument, the district court cited this Court's decision in *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974) ("Blanchette"):

> "However, '[w]here the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect.' [Blanchette]. 'The Supreme Court has long . . . held that where the enforcement of a statute is certain, a pre-enforcement challenge will not be rejected on ripeness grounds.' NAACP, supra, 522

> F.3d at 1164 (citing Blanchette, supra, 419 U.S. at 143)."

Florida, supra, at 22.

As to the issue of ripeness, the district court further concluded that the Individual Mandate provision is the cornerstone of the Act and will be enforced, and, therefore, is ripe to be challenged before its effective date:

> "The complained of injury in this case is 'certainly impending' as there is no reason whatsoever to doubt that the federal government will enforce the individual mandate and employer mandate against the plaintiffs. Indeed, with respect to the individual mandate in particular, the defendants concede that it is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss. It will clearly have to be enforced. See Commonwealth of Pennsylvania v. State of West Virginia, 262 U.S. 553, 592-93, 262 U.S. 553, 43 S. Ct. 658 (1923) (suit filed shortly after the challenged statute passed into law and before it was enforced was not premature where the statute 'certainly would operate as the complainant states apprehended it would')."

Id.

Finally, the district court in *Florida* went on to find that the Individual Mandate provision may be

unconstitutional because it exceeds Congress' power under the Commerce Clause. *Id.* at 33-35.[1] Consequently, *Florida* is in direct conflict with the decision in the Michigan case, *Thomas More Law Center v. Obama*, ___ F.Supp.2d ___, 2010 WL 3952805 (E.D. Mich.) (*"Thomas More"*), which found that the Individual Mandate provision did not exceed Congress' power under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari before judgment in the court of appeals should be GRANTED.

Respectfully submitted,

PETER D. LEPISCOPO
Counsel of Record

Counsel for Petitioners
Steve Baldwin and
Pacific Justice Institute

October 15, 2010.

[1] However, the district court was not required to decide the question at this point because it denied the government's F.R.Civ.P., Rule 12(b)(6) motion to dismiss because *"plaintiffs have at least stated a plausible claim"* that the Individual Mandate transgresses the Commerce Clause. *Id.* at 35.